

## **24<sup>TH</sup> FEDERAL LITIGATION COURSE**

### **REMOVAL OF CASES TO FEDERAL COURT**

#### **Outline of Instruction**

#### **I. INTRODUCTION**

State courts of general jurisdiction may handle virtually any case, even those involving federal questions and federal defendants. There is no general principle of law that federal issues or federal defendants get a federal forum. There are reasons, however, why the federal government or a federal defendant may prefer a federal forum to a state forum (*e.g.*, avoidance of local bias and uniform application of federal laws). Access to the federal forum, however, comes only through the authority of a federal statute. Certain federal statutes permit federal defendants to remove their cases from the state court to a federal court. Our focus is how and when we remove a case to the federal court when the United States, one of its agencies, employees, or a service member is sued in a state court.

#### **II. REMOVAL**

##### **A. General.**

1. Removal is a procedure unique to our federal system of government, a creature of statute, unknown at common law. It is the practice of transferring a cause of action from a state court to the United States District Court. In the absence of express statutory authority to remove a case, a case brought in a state court must remain there. Further, a case that might otherwise be removable may not be removed if a statute prohibits removal (a corollary of the principle that federal courts are courts of limited jurisdiction). See, *e.g.*, 28 U.S.C. § 1445 (this statute, titled "Nonremovable Actions" prohibits the removal of certain causes of action, including, for example, civil actions against a railroad or its receivers, civil actions in state courts arising under state workmen's compensation laws).

2. Removal statutes most often encountered:
  - a. 28 U.S.C. § 1441, general removal statute.
  - b. 28 U.S.C. § 1442, removal of cases of federal officers sued or prosecuted in state court.
  - c. 28 U.S.C. § 1442a, removal of cases of service members sued or prosecuted in state court.
  - d. 28 U.S.C. § 2679(d), federal employee's immunity act (commonly referred to as the "Westfall Act").
  - e. 10 U.S.C. § 1089, physician's immunity act (also known as the "Gonzalez Act").
  - f. 10 U.S.C. § 1054, lawyer's immunity act.
3. Removal issues in a particular case arise from three basic (procedural) questions:
  - a. What statute permits removal?
  - b. How is removal accomplished?
  - c. What happens to the case after it is removed?

**B. Removal Statutes.** (The time and technical requirements for the various removal statutes are discussed below at "**C. Removal Procedures**".)

1. **28 U.S.C. § 1441. Actions removable generally.**

a. **Original jurisdiction.** This statute allows removal of civil (not criminal) cases from state to federal court (for the district in which the action is pending) provided that the federal court has original jurisdiction. Original jurisdiction falls into two categories: federal question and diversity.

(1) **Federal question.** Removal of cases invoking a federal question is permitted without regard to citizenship of the parties and without regard to the amount in controversy. 28 U.S.C. § 1441(b).

(a) Since federal courts are courts of limited jurisdiction, federal question jurisdiction exists only if a federal statute creates it. The most common jurisdictional basis for federal questions is 28 U.S.C. § 1331 (granting the federal courts jurisdiction over cases arising under the Constitution, treaties, or laws of the United States).

(b) All defendants must join in the petition for removal. *Doe v. Kerwood*, 969 F.2d 165 (5th Cir. 1992).

(2) **Diversity of citizenship.** Removal is also permitted of cases over which the federal courts have diversity jurisdiction. Diversity refers to a circumstance where there is no common state citizenship between plaintiffs and defendants. The statutory basis of diversity jurisdiction is 28 U.S.C. § 1332. The same jurisdictional rules apply to removal as to diversity cases.

(a) **Amount in controversy.** The amount in controversy must be at least \$75,000. 28 U.S.C. § 1332(a).

- (b) **Complete diversity.** Diversity must be complete; *i.e.*, no plaintiff and defendant may be citizens of the same state.
- (c) In addition to the jurisdictional concerns, there are some special rules for removal of diversity cases.
  - i) No defendant (properly joined and served) may be a citizen of the state where the action is brought. If plaintiff sues in one defendant's home state, no defendant may remove (provided the home state defendant has been served) even where there is complete diversity. 28 U.S.C. § 1441(b); *Laughlin v. Prudential Ins. Co.*, 882 F.2d 187 (5th Cir. 1989).
  - ii) In determining diversity, disregard fictitious names. 28 U.S.C. § 1441(a); *Kruso v. International Tel. & Tel. Corp.*, 872 F.2d 1416, *cert. den.* 496 U.S. 937 (1989).
  - iii) All defendants must join in the petition for removal. *P.P. Farmers' Elevator Co. v. Farmers Elev. Mut. Ins. Co.*, 395 F.2d 546 (7th Cir. 1968).
- b. **Narrow construction.** Because removal infringes upon state authority and sovereignty, the provisions of § 1441 are strictly construed, and doubts are resolved in favor of remand to the state court. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941); *Mishimoto v. Federman & Assoc.*, 903 F.2d 709 (9th Cir. 1990); *Illinois v. Kerr-McGee Chem. Corp.*, 677 F.2d 571 (7th Cir.), *cert. denied*, 459 U.S. 1049 (1982).
- (1) Courts of appeals are split on whether § 1441(a) requires federal jurisdiction over the entire action for removal. See *Archuleta v. LaCuesta*, 131 F.3d 1359 (10<sup>th</sup> Cir. 1997)(describing the split).

(2) Under § 1441(c), however, if any separate and independent claim in a case invokes federal question jurisdiction, the entire case is removed. The district court may remand all matters in which state law predominates. This may provide a jurisdictional basis for removal that is separate from § 1441(a).

- c. **Well-pleaded complaint rule.** The presence or absence of federal-question jurisdiction is governed by the "well-pleaded complaint rule," which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint. Federal defenses (*e.g.*, federal preemption) to state law claims are not grounds for removal because the defense does not confer jurisdiction on the federal court. *Burda v. M. Ecker Co.*, 954 F.2d 434 (7th Cir. 1992).
- d. **Artful pleading doctrine.** Sometimes referred to as the corollary of the well-pleaded complaint rule, this provides that a plaintiff may not frame his action under state law and omit federal questions that are essential to recovery, nor artfully omit facts that indicate federal jurisdiction. *Marzuki v. AT&T Technologies*, 878 F.2d 203 (7th Cir. 1989); *Oglesby v. RCA Corp.*, 752 F.2d 272 (7th Cir. 1985).
- e. **Preemption.** Sometimes Congress preempts state laws in areas of federal concern. When preemption is complete, leaving no state claim at all, removal is proper even where the well-pleaded complaint relies only upon state law. *Caterpillar Inc. v. Williams*, 482 U.S. 386 (1987). This special exception occurs only where Congress has "occupied the field" as in LMRA and ERISA cases. While these are special statutes, much of the modern case law regarding removal involves questions of preemption.

2. **28 U.S.C. § 1442. Federal officers or agencies sued or prosecuted.**

The right of the individual to remove is absolute, should be liberally granted, and does not require non-federal co-defendants to join. *Willingham v. Morgan*, 395 U.S. 402 (1969). *See, e.g., Oklahoma Bankers Ass'n v. Home Sav. & Loan Ass'n*, 625 F. Supp. 993 (W.D. OK 1984).

a. **Civil or criminal.** Section 1442 provides for removal of civil or criminal actions brought in state court against officers of the United States.

(1) Unlike § 1441, this section allows removal of a criminal action.

(2) Contempt proceedings against a federal official ancillary to a private state court action are removable. *Swett v. Schenk*, 792 F.2d 1447 (9th Cir. 1986).

b. **Officers and agencies of U.S.** This provision allows removal of actions against officers of the United States or any agency thereof, or against a person acting under an officer or agency of the United States; and since 1996, allows removal of actions against the United States or any agency thereof.

(1) The statute extends to officers of the United States or officers of agencies of the United States. *Mignogna v. Sair Aviation, Inc.*, 937 F.2d 37 (2d Cir. 1991).

(2) Before 1996 agencies of the government did not enjoy a right of removal. *International Primate Protection Educational Fund*, 500 U.S. 72 (1991). Congress amended the statute in 1996 to overrule this case. *See, Nebraska v. Benton*, 146 F.3d 676 (9<sup>th</sup> Cir. 1998).

(3) The statute also allows removal by an individual who is not a federal officer, but who at the time of the events giving rise to the action, was acting under the control and direction of a

federal officer. *See Colorado v. Maxwell*, 125 F. Supp. 18 (D. Colo. 1954) (city police chief was acting under a federal officer while detaining a drunk soldier at the request of an Air Force officer).

c. **Color of office.** Removal under this provision applies only for actions taken under color of office.

(1) **Federal defense must be alleged.** In contrast to § 1441 (and the well-pleaded complaint rule) here a federal defense is both necessary and sufficient. *Mesa v. California*, 489 U.S. 121 (1989). *Compare Georgia v. Walker*, 660 F. Supp. 952 (M.D. Ga. 1987) (mail carrier charged with DUI not entitled to removal), *with, Puerto Rico v. Santos-Marrero*, 624 F. Supp. 308 (D. P.R. 1985) (soldier charged with reckless driving while part of a convoy entitled to removal).

(2) **Broad construction.** The statute is read broadly to allow a federal officer a federal forum for a federal defense.

(a) It is usually sufficient to show that the federal defendant's relationship with the plaintiff derived from official duties. *Willingham v. Morgan*, 395 U.S. 402 (1969).

(b) "Color of office" is broader than "scope of employment." *Palermo v. Rorex*, 806 F.2d 1266 (5th Cir.), *cert. den.*, 484 U.S. 819 (1987). See also *Las Cruces v. Maldonado*, 652 F. Supp. 138 (D. N.M. 1986) (assault of subordinate by Postal Service supervisor was under color of office).

3. **28 U.S.C. § 1442a. Members of armed forces sued or prosecuted.**

a. **Armed forces.** This provision is very similar to § 1442 but applies only to members of the armed forces.

- (1) Members of the military are "officers of the United States" under § 1442, so there is some redundancy here.
  - (2) Reservists are "members of the armed forces" even if on inactive duty status. *Gilbar v. U.S.*, 1998 WL 1632693 (S.D. Ohio) (citing *Howard v. Sikula*, 627 F. Supp. 497 (S.D. Ohio 1986)).
  - (3) Retirees are members of the armed forces" for purposes of removal of proceeding on account of act done under color of office. *Matter of Marriage of Smith*, 549 F. Supp. 761 (D.C. Tex. 1982).
- b. **Civil or criminal.** It applies to both civil and criminal cases.
- c. **Color of Office.** The case must have arisen from actions taken under color of office. The analysis of this factor by courts is highly case specific. Compare, *Georgia v. Westlake*, 929 F. Supp. 1516 (M.D. GA 1996) (traffic accident not under color of office) with *Puerto Rico v. Santor-Marreero*, 624 F. Supp. 308 (D. Puerto Rico 1985) (traffic accident occurred under color of office).
- d. **Before trial.** Section 1442a offers some additional protection from § 1442 because removal can be accomplished "any time before trial."



4. **28 U.S.C. § 2679(d). Federal Employees Liability Reform and Tort Compensation Act** (the "Westfall Act").

- a. **Individual immunity.** A suit against the United States is the exclusive remedy for personal injury, death, or property damage caused by a federal employee acting within the scope of employment. Immunity of the individual is absolute. *U.S. v. Smith*, 499 U.S. 160 (1991).
- b. **Substitute U.S.** After removal of the case to federal district court, the individual defendant is dismissed and the case is "deemed an action against the United States."
- c. **Before trial.** Removal may be accomplished any time before trial.
- d. **Jurisdiction.** Unlike the general removal statute (§ 1441), removal under this statute does not depend on underlying federal jurisdiction. Once the United States is substituted as defendant, it may assert any defense available to it. If such a defense affects jurisdiction (*e.g.* discretionary function, sovereign immunity), the case must be dismissed.
- e. **Procedure.** Before removal is permitted, the Attorney General (through the U.S. Attorney) must certify that the federal employee was acting within the scope of employment at the time of the act complained of.
- f. **Review.**
  - (1) The federal employee may challenge the U.S. Attorney's refusal to certify by petition to the federal district court. In the event that the petition is filed in a civil action or proceeding in a state court, the case may be removed by the Attorney General, reviewed by the district court, and then remanded if

the denial of certification is upheld. Section 2679(d)(3).

- (2) Certification is also reviewable by the U.S. district court. *Gutierrez v. Lamagno*, 515 U.S. 417 (1995). If certification is reversed, it is not clear whether the case may or must be remanded.

5. **10 U.S.C. § 1089. Gonzalez Act.**

- a. **Individual immunity.** The exclusive remedy for medical malpractice involving armed forces medical personnel is suit against the United States under FTCA. (**NOTE:** 28 U.S.C. § 2679(d) generally covers these cases in lieu of § 1089. *U.S. v. Smith*, 499 U.S. 160 (1991))
- b. **Substitute U.S.** Upon removal to federal court the individual defendant is dismissed and the United States is substituted as defendant.

6. **10 U.S.C. § 1054. Lawyers immunity.**

- a. **Individual immunity.** The exclusive remedy for malpractice by a member of a DoD legal staff is a suit against the United States under the FTCA (Again, 28 U.S.C. § 2679(d) generally covers these cases).
- b. **Substitute U.S.** Upon removal to federal court, the individual is dismissed and the United States is substituted as the defendant.

## **C. Removal Procedures.**

### **1. Civil Actions.**

a. **Notice of removal.** Removal is accomplished under 28 U.S.C. § 1446(a) by--

- (1) filing a notice of removal in the United States district court;
- (2) signed pursuant to Fed. R. Civ. P. 11;
- (3) containing a short and plain statement of the grounds for removal and copies of all process and pleadings served on defendant.

b. **Time to file.** the time limit for filing a notice of removal varies by the statute.

(1) **30 days after receipt (§§ 1441 and 1442).** Notice of removal under § 1441 or § 1442 must be filed within 30 days after receipt by defendant of the initial pleading (through service or otherwise). 28 U.S.C. § 1446(b). The 30-day time limit, while not generally considered jurisdictional, is strictly construed. *Tech Hills II Assoc. v. Phoenix Home Life*, 5 F.3d 963 (6th Cir. 1993).

(a) Service is not necessary. Receipt of a copy of a pleading could trigger the start of the 30 days.

(b) A case that is not removable may become removable later. The 30-day period begins whenever the case becomes removable. A diversity action, however, may not be removed more than one year after the original action was "commenced." 28 U.S.C. § 1446(b).

(2) **Before trial (immunity statutes).** Notice of removal under §

1442a, § 2679(d), § 1089, or § 1054 may be filed any time before trial.

- c. **Notice constitutes removal.** Notice of the removal must be given to all parties, and the notice of removal must be filed in the state court. 28 U.S.C. § 1446(d). Filing the notice in the state court "effects removal" and precludes the state court from taking further action in the case. 28 U.S.C. § 1446(a).
  
- d. **Changes from earlier law.** Amendments by Congress in 1988, 1990, and 1996 made certain changes to the statute that are separately mentioned here as a context for reading earlier case law.
  - (1) **1988:** A "notice of removal" (rather than a petition) is filed in the district court. (This recognizes that nothing is "petitioned," but, rather, removal is automatic.)
  - (2) **1988:** The attorney's signature replaces the old requirement of verification of the notice. (A signature of an attorney, which is subject to Fed. R. Civ. P. 11, is sufficient to deter abuse.)
  - (3) **1988:** The requirement that a bond be posted was eliminated. (If a case is remanded, a court may require the removing defendant to pay plaintiffs expenses, including attorney fees. 28 U.S.C. § 1447(c).)
  - (4) **1990:** Removal of separate state claims under § 1441(c) can only occur where the independent federal claim that is being removed invokes federal question jurisdiction. (Diversity jurisdiction is excluded from § 1441(c).)
  - (5) **1996:** The limitation of § 1442 to officers of the United States was removed and agencies may now (since 1996) remove cases in which they are defendants.
  - (6) **1996:** The requirement that motions to remand on procedural

grounds be filed within 30 days was expanded to cover all grounds other than lack of subject matter jurisdiction.

2. **Criminal Actions.**

a. **Time for removal.**

(1) **Section 1442.** Notice of removal under § 1442 must be filed 30 days after arraignment or before trial, whichever is earlier. The district court may upon a showing of good cause allow a later filing. 28 U.S.C. § 1446(c)(1).

(2) **Section 1442a.** Removal under § 1442a may be accomplished any time before trial.

b. **All grounds.** Notice must contain all grounds for removal. Failure to raise an available basis for removal results in waiver. 28 U.S.C. § 1446(c)(2).

c. **Federal defense.** Under *Mesa v. California*, 489 U.S. 121 (1989) a federal defense must be alleged.

d. **Actions by district court.**

(1) The district court must examine the notice promptly and dismiss if it is clear on the face of the notice that removal is not available. 28 U.S.C. § 1446(c)(4).

- (2) If the notice is facially valid, the court must order a prompt evidentiary hearing to determine whether removal is warranted. 28 U.S.C. § 1446(c)(5).
  - (3) If removal is permitted, the district court must notify the state court. At this point state proceedings must stop. (During pendency of removal application the state may continue its process short of entering a judgment.)
- e. **Standard.** The district court will dismiss the state law criminal action if (1) the federal agent was performing an act that was authorized by federal law, and (2) in performing the authorized act the federal agent did no more than what was necessary and proper for him to do. *Kentucky v. Long*, 837 F.2d 744 (6th Cir. 1988).

#### **D. Disposition After Removal.**

1. **Applicable law.** What law applies to the controversy after removal to federal court?
  - a. **Substantive.** Removal does not alter the underlying (substantive) law to be applied (state or federal). *Arizona v. Manypenny*, 451 U.S. 232 (1981).
  - b. **Procedural.** After removal federal procedures apply. *RTC v. Northpark Joint Venture*, 958 F.2d 1813 (5th Cir. 1992).
2. **State court orders.** All state court injunctions and orders remain in full force after removal. 28 U.S.C. § 1450. Federal law governs the orders procedurally. *Granny Goose Foods, Inc. v. Brotherhood of Teamsters Local 70*, 415 U.S. 423 (1974). The court treats orders as if issued by the federal court (*i.e.*, it "federalizes" the order). As such they are subject to federal rules (including limits) and may be modified or vacated by the district court. *Nissho-Iwai American Corp. v. Kline*, 845 F.2d 1300 (5th Cir. 1992).
3. **Motion to remand.** Since removal in a civil action is accomplished upon

filing the notice of removal in the federal court (with notice to the state court), challenge to removal is had by a motion to remand.

a. **Time to file.**

(1) **Procedural defect.** A motion to remand based on any defect other than subject matter jurisdiction must be filed within 30 days after the notice of removal is filed. 28 U.S.C. § 1447(c).

(2) **Jurisdictional defect.**

(a) A motion to remand based on subject matter jurisdiction may be filed any time before final judgment. 28 U.S.C. § 1447(c).

(b) The court must remand on motion or *sua sponte* if at any time before judgment it appears that removal was without subject matter jurisdiction. *Rothner v. City of Chicago*, 879 F.2d 1402 (7th Cir. 1989).

b. **Discretion to remand.** The court has discretion to remand certain cases even outside the 30-day limit. *Carnegie-Mellon Univ. v. Cahill*, 484 U.S. 343 (1988) (remand of state law pendent jurisdiction claim is proper when the federal law claims have dropped out of the case).

c. **Discretion to deny joinder.** If a party seeks joinder in the federal court that would defeat diversity jurisdiction, the court may either deny joinder or grant it and remand. 28 U.S.C. § 1447(e); *Steel Valley Auth. v. Union Switch & Signal Div.*, 809 F.2d 1006 (3d Cir. 1987).

d. **State law matters.** Under 28 U.S.C. § 1441(c) (as amended in 1990) the court may remand "all matters" in which state law predominates, including, presumably, the entire case when § 1331 jurisdiction is

really secondary.

- e. **No appeal of remand.** An order remanding a case to the state court from which it was removed is not reviewable by appeal or otherwise. 28 U.S.C. § 1447(d). A decision to remand on grounds that the case was removed without jurisdiction is "not subject to challenge ... by appeal, by mandamus, or otherwise". *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336 (1976).
  - (1) **Jurisdictional rule.** If the remand order contains the "magic words" that removal was without jurisdiction, the appellate court is without jurisdiction to review the order even if it is clearly erroneous. *Severonickel v. Gaston Reymenants*, 115 F.3d 65 (4<sup>th</sup> Cir. 1997); *Richards v. Federated Dep't Stores, Inc.*, 812 F.2d 211 (5th Cir.) *cert. den.*, 484 U.S. 824 (1987). See also *Mitchell v. Carlson*, 896 F.2d 128 (5th Cir. 1990) (contemporaneous collateral order was appealable).
  - (2) **Limited exception.** If the remand order affirmatively states a ground for remand other than jurisdiction, review by mandamus may be available. *In the Matter of Shell Oil Co.*, 966 F.2d 1130 (7th Cir. 1992); *Air-Shields v. Fullam*, 891 F.2d 63 (3d Cir. 1989) (mandamus appropriate where district court acted outside 30-day limit on remand motions); *New Orleans Pub. Serv., Inc. v. Majoue*, 802 F.2d 166 (5th Cir. 1986).
  - (3) **Certification for appeal.** A district court in its discretion may certify a remand issue for interlocutory appeal. Defendant must seek certification under 28 U.S.C. § 1292(b).



### III. REPRESENTATION ISSUES

Removal is only one of the procedural steps in representing the client. Full representation requires examining the sufficiency of the complaint in all respects.

A. Has the defendant been properly served in his individual capacity?

1. The method for service is that provided for under the law of the state in which the district court is located or in which service is effected or by delivering a copy of the summons and complaint to the individual personally, or to an agent authorized to receive service, or by leaving the summons and complaint at the individual's house or place of abode. Fed. R. Civ. P. 4(e)(2).
2. Fed. R. Civ. P. 4(d) also permits the defendant to waive service within 30 days of a request by plaintiff (by first class mail with a copy of the complaint). A defendant who waives service gets 60 days to answer. A defendant who declines to waive service will be charged with the costs of personal service.
3. Fed. R. Civ. P. 4(i)(2) and 28 U.S.C. § 1391(e), provide for nationwide service on officers of the United States by registered or certified mail, in suits against such officers in their official capacities. *Stafford v. Briggs*, 444 U.S. 527 (1980).
4. In a lawsuit against the United States or an officer of the United States, the plaintiff must also serve the United States Attorney for the district in which the action is brought and the Attorney General, both by registered or certified mail (or delivery, in the case of the U.S. Attorney). Fed. R. Civ. P. 4(i)(1)(A) and (B). *See Light v. Wolf*, 816 F.2d 746 (D.C. Cir. 1987); *Lawrence v. Acree*, 79 F.R.D. 669 (D.D.C. 1978).
5. Fed. R. Civ. P. 4(m) requires service within 120 days after filing the complaint. After 120 days the court may dismiss the complaint as to any unserved defendant without prejudice or may extend the time if plaintiff shows good cause for the failure to serve.

- B. Does the court have personal jurisdiction over the defendant?
1. If the defendant is not "present" in the forum state, does he have sufficient "minimum contacts" with the forum state to support the exercise of personal jurisdiction? *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).
  2. Does the state's long-arm statute reach the activities giving rise to the complaint? *See, e.g., Rufo v. Bastian-Blessing Co.*, 405 Pa. 12, 173 A.2d 123 (1961) (state long-arm statute did not extend to outer limits of due process.).
- C. How much time does the defendant have to answer or otherwise plead? Under the December 1, 2001, changes to Fed.R.Civ.P. 12(a)(3)(B), Bivens defendants have 60 days to answer. In addition the December 1, 2001, changes to Fed.R.Civ.P. 4(i)(2)(B) require service upon the United States in addition to a Bivens defendant whenever such defendant is sued in an individual capacity.
- D. Is venue proper? Unless provided otherwise by statute venue is proper only in a district in the state where all defendants reside, or where a substantial part of the claim arose. Special rules may apply in diversity and non-diversity cases and where defendant is an employee of the United States. 28 U.S.C. § 1391(a), (b), and (e), respectively.
- E. What affirmative defenses are available that must be pleaded under Fed. R. Civ. P. 8(c)?
- F. Does the defendant have an insurance policy that conditions coverage upon prompt notification and tender of the defense?

#### IV. CONCLUSION

Removal is a simple, almost automatic, procedure. Prompt attention to any state court action is essential, however, because time limits may be short. A thorough knowledge of the various removal statutes is necessary because an error that results in remand is final.